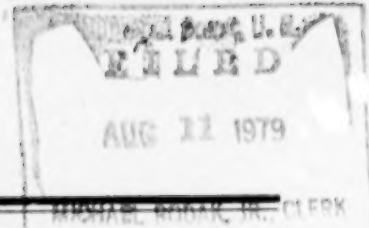


No. 78-1717



In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH DOTTINO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his conviction for willfully attempting to evade income taxes and for filing false returns, contending that the prosecution improperly commented on his failure to introduce certain books and records into evidence and on his failure to raise a defense during the investigation.¹

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on two counts of willfully attempting to evade income taxes and two counts of willfully filing false income tax returns for 1972 and 1973, in violation of 26 U.S.C. 7201 and 7206(1). The district court sentenced petitioner to

¹The judgment of the court of appeals was entered on March 22, 1979. The petition was not filed until May 14, 1979. It is therefore out of time under Rule 22(2) of the Rules of this Court.

concurrent six-month terms of imprisonment to be followed by two three-year terms of probation, to commence after the completion of the prison term. The court of appeals affirmed (Pet. App. 1a-2a).

At trial, petitioner did not challenge the government's evidence that he had underpaid his taxes and filed false returns for the years in issue. His defense was that his landlord had arranged for a constable to remove his books and records from his business premises as a result of nonpayment of rent, and that it was accordingly impossible for him to compute his tax liability accurately. Petitioner took the position that this fact precluded a finding of willfulness. Although petitioner did not testify, he did call his wife and his former landlord, both of whom testified as to the seizure of the books and records; petitioner also cross-examined the accountant who prepared his returns and again elicited testimony regarding the books and records. Petitioner never produced the books and records at trial or explained his inability to do so. During summation, the prosecutor pointed out to the jury that petitioner had not produced the books and records for introduction into evidence and argued that petitioner had not done so because they had nothing to do with the case.²

²The prosecutor stated as follows (Summation, July 26, 1978, at 9):

Then later you heard Mr. Levitin talk about all of these records. And what did he say? There were big books, piles and piles of books he saw. Did you see any of those books in this courtroom? No, you didn't.

Why, ladies and gentlemen? Because they had nothing to do with the money that Mr. Dottino didn't report on his income tax returns. That's why you didn't see them [*Ibid.*].

Did you hear anything about the constable in '74? No. Of course not. Because he hadn't heard about finding out the \$188,000. That's why you don't hear about the constable [*Id.* at 11].

1. Petitioner first contends (Pet. 4) that the prosecutor's comments with respect to his failure to produce the books and records at trial violated his Fifth Amendment privilege against compulsory self-incrimination.

But all of the testimony at trial showed that the books and records reflected the financial transactions of a business called either Joel Contracting or Joel Equipment Company, which was run as a sole proprietorship owned by petitioner's wife. The uncontroverted testimony of petitioner's wife (Tr. 56-60, 62-64, 66-68) and of the accountant who prepared petitioner's returns (Tr. 1, 3-8, 10-11, 16-18) established that petitioner did not have an ownership or possessory interest in the books and records, did not maintain or prepare the records, and, indeed, had absolutely no connection with them. Under these circumstances, petitioner had no Fifth Amendment privilege against self-incrimination with respect to these books and records (see *Fisher v. United States*, 425 U.S. 391 (1976)). Hence, the prosecutor's comments did not violate petitioner's privilege against self-incrimination.

At all events, even on the assumption that the books and records were privileged, the prosecutor's remarks could not have been interpreted by the jury as an attack

Where are the books and records? Well, the constable took them.

Then he is given them back in July. Mr. Saposnick was to put in any expenses.

What happened to the books and records? Mr. Hoffman came back from the dead and took the records [*Id.* at 13].

We don't know what happened to the books and records. Although one thing you can be pretty sure of, they have nothing to do with this case, those books and records. And if they had and if they were so crucial, where are they? Where are the big books that Mr. Levitin told you about? They are not here. We uncovered some checks and Mr. Saposnick brought those into the IRS but where are these big ledger books? [*Id.* at 15-16].

on petitioner's invocation of the right to remain silent. The test to be used in determining whether a prosecutor's remarks constitute an improper comment on an accused's invocation of the privilege against self-incrimination is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's assertion of the privilege. See, e.g., *United States v. Chandler*, 586 F. 2d 593, 603-605 (5th Cir. 1978), cert. denied, No. 78-6083 (Feb. 21, 1979); *United States v. Rochan*, 563 F. 2d 1246, 1248-1250 (5th Cir. 1977). Here, petitioner's entire defense rested on the inference that the books and records contained accurate information and that their unavailability was the reason for the false returns. In effect, he argued, through his witnesses, that these books contained exculpatory evidence. The prosecutor's comments simply challenged the testimony of petitioner's witnesses and argued that petitioner had failed to corroborate his witnesses' testimony that the books would have exonerated him. It is not improper for the prosecution to point out to the jury that the evidence which allegedly would support the witnesses's testimony was never produced. *United States v. Lopez*, 584 F. 2d 1175, 1178-1179 (2d Cir. 1978); *United States v. Bubar*, 567 F. 2d 192, 199-200 (2d Cir.), cert. denied, 434 U.S. 872 (1977); *United States v. Dana*, 457 F. 2d 205, 209-210 (7th Cir. 1972). Cf. *Lockett v. Ohio*, 438 U.S. 586, 594-595 (1978); *Lakeside v. Oregon*, 435 U.S. 333, 338-339 (1978).

2. Petitioner also contends (Pet. 5) that the prosecutor improperly commented on his failure to assert the defense of the loss of the books and records during the

investigatory stages of this case.³ In petitioner's view, once the investigating agents of the Internal Revenue Service advised him of his right to remain silent, he was under no obligation to inform those agents of any potential defenses he may have had, and his "silence" during the investigation cannot be used against him at trial. In support of this argument, petitioner relies (Pet. 5) on *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Harp*, 536 F. 2d 601 (5th Cir. 1976); and *Reid v. Riddle*, 550 F. 2d 1003 (4th Cir. 1977). See also *United States v. Hale*, 422 U.S. 171 (1975).

But these cases only stand for the proposition that if an accused remains silent after having been told of his right to do so, the prosecution cannot use at trial the fact that the accused remained silent to impeach the credibility of a defense asserted for the first time at trial. Here, however, petitioner did not exercise his right to remain silent during the investigation. Rather, he freely discussed the financial records in issue with the investigating agents. As Eric Fried, a special agent with the Internal Revenue Service, testified (Tr. 21), he, together with two other agents, interviewed petitioner and his attorney. At the beginning of the interview, the agent advised petitioner of his right to remain silent.⁴ The agent further testified (Tr. 23) that petitioner stated to him that he had no formal books and records for his business, and that the only records in existence were deposit slips and checks. On cross-

³The prosecutor stated as follows (Summation. July 26, 1978, at 11):

"Did you hear anything about the constable in '74? No. of course not. Because he hadn't heard about finding out the \$188,000. That's why you don't hear about the constable."

⁴Since this interview did not constitute a custodial interrogation, there was no constitutional obligation to give any warnings. See *Beckwith v. United States*, 425 U.S. 341 (1976).

examination (Tr. 25), Fried testified that petitioner had stated that his wife maintained whatever books and records existed and that she had given the books to the accountant.

It is therefore plain that petitioner's statements at his interview were completely at variance with his defense at trial that a constable had seized his records at the behest of his landlord. Since petitioner, after having been advised of his right to remain silent, discussed with the investigating officials the very topic upon which he later based his defense at trial, the prosecutor could fairly advise the jury on the inconsistencies between the two stories. See, e.g., *United States v. Agee*, 597 F. 2d 350 (3d Cir. 1979); *Twyman v. State of Oklahoma*, 560 F. 2d 422, 424 (10th Cir. 1977), cert. denied, 434 U.S. 1071 (1978); *United States v. Mitchell*, 558 F. 2d 1332, 1334-1335 (8th Cir. 1977); *United States v. Joyner*, 539 F. 2d 1162 (8th Cir.), cert. denied, 429 U.S. 983 (1976). See also *Harris v. New York*, 422 U.S. 222 (1971).⁵

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

⁵Whatever prejudice may have ensued from the prosecutor's comments was mitigated by the trial court's repeated instructions (Jury Charge, July 27, 1978, at 12, 24) to the jury that the petitioner was under no duty to call any witnesses or produce any evidence.